IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81- 81 6854

FREDDIE DAVIS, Petitioner,

v.

STATE OF GEORGIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF GEORGIA

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FREDDIE DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner, Freddie F. Davis, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia denying his application for certificate of probable cause to appeal the denial of his petition for writ of habeas corpus.

ORDER BELOW

The order of the Supreme Court of Georgia denying petitioner's application for certificate of probable cause to appeal the denial of petitioner's petition for writ of habeas corpus is not reported. A copy of said order and the order denying the petitioner's motion for rehearing is provided in the appendix. This case was previously remanded to the Georgia Supreme Court for reconsideration in light of Godfrey v. Georgia. Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819

(1980). On remand the Georgia Supreme Court reaffirmed the death sentences and a second petition for certiorari was denied. Davis v. Georgia, 451 U.S. 921, 101 S. Ct. 2000, 69 L.Ed.2d 413 (1981).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The order of the Supreme Court of Georgia was entered on March 24, 1982 and a motion for rehearing was denied on April 8, 1982. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

AMENDMENT V, UNITED STATES CONSTITUTION:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

AMENDMENT VI, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

AMENDMENT VIII, UNITED STATES CONSTITUTION:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

AMENDMENT XIV, UNITED STATES CONSTITUTION:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED SECTION 27-2534.1:

> . . . In All cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony . . . The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim . . . The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt . . . .

QUESTIONS PRESENTED

1. Whether petitioner was twice put in jeopardy by the state's allegation of new "aggravating circumstances" at a new sentencing trial after appellate reversal of the original sentence of death.

2. Whether the statutory "aggravating circumstance" upon which the jury relied in deciding upon death is so overbroad and vague that petitioner's sentence based upon this statutory provision was unconstitutional in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980).

3. Whether the Georgia Supreme Court has failed to follow the appellate review process which this Court assumed in Gregg, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), to be necessary to the constitutionality of the Georgia statutory scheme.

4. Whether the use in evidence of three statements made by petitioner was proper when the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), were not given until after the second statement; were incomplete; and when the prosecution fails to show comprehension as well as relinquishment.

5. Whether the petitioner's trial counsel's representation was so inadequate and ineffective as to deprive petitioner of the "reasonably effective" assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

6. Whether the death penalty may be constitutionally imposed on the basis of jury instructions that: (a) fail to instruct the jury to focus on the characteristics of the defendant as well as the nature of the crime, (b) fail to explain the term "mitigating," or to direct the jury's attention to specific mitigating circumstances present in the case and (c) do not guide the jury to weigh mitigating circumstances against aggravating circumstances.

STATEMENT OF THE CASE

The charge for which petitioner was arrested, tried, and convicted and sentenced to death was that he acted in concert with Eddie Spraggins to rape and murder Frances Coe. The Supreme Court of Georgia affirmed the murder conviction and rape conviction in 1978 but vacated and reversed the imposition of the sentence of death as a result of inadequate jury instructions. [1]

At petitioner's first sentencing trial, the state alleged only the "aggravating circumstance" of "commission of an additional capital felony, to wit, the rape of Frances Coe"[2] and on that basis, the jury recommended a death verdict. After reversal of the death sentence on direct appeal, Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978), at the new sentencing trial, the state added the allegation of "aggravating circumstances" that the offense was "outrageous, wantonly vile, inhuman and involved torture and depravity of mind . . . and aggravated battery . . ."[3] Adding this second allegation involved no new evidence and in fact resulted in the use of the same witnesses and same testimony as at the first trial. No reason of any kind appears in the record for the addition of this new, second allegation of "aggravating circumstances" at the resentencing trial.

The jury instructions on sentencing and the death penalty[4] gave no examples of "mitigating;" did not attempt to define or explain the "outrageous, wantonly vile . . ." instruction; asked the jury only to "recommend;" and contained the other defects discussed infra.

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[1]Petitioner received a life sentence for the rape conviction.

[2]Page 283 of transcript of first trial in 1977. (Hereinafter referred to as "Tr.")

[3]Page 363 of transcript of resentencing trial in 1978. (Hereinafter referred to as "2d Tr.")

[4]2d Tr. pp. 353-362.

During presentation of the evidence, the investigating police officer was allowed to testify concerning three statements given by the petitioner. The first statement was given at home--petitioner was not a suspect supposedly--and no warnings of constitutional rights were given.[5] The second statement was taken at the police station[6] when obviously the police did not believe the first statement. No warnings of constitutional rights were given the defendant until after he made this second statement.[7] In this statement, petitioner admits going to the home of the deceased with the co-defendant Spraggins knowing that a robbery was planned; admits an assault on the deceased by Spraggins; admits knowledge of sexual assault; and gives the police knowledge of physical evidence which is used at the trial.[8] Constitutional warnings were given before the third statement where petitioner admitted killing the deceased but these warnings were incomplete.[9]

All three of the statements by petitioner were used in evidence against petitioner at the resentencing trial.[10]

Based on the above, the resentencing jury "recommended" death and petitioner was sentenced to death.[11]

The Supreme Court of Georgia affirmed the death sentence. Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978).

A timely petition for certiorari was filed with the Supreme Court of the United States and this petition was granted. On May 27, 1980, the Supreme Court of the United States reversed

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[5] 2d Tr. p. 147.

[6] 2d Tr. p. 148.

[7] 2d Tr. pp. 149, 142.

[8] 2d Tr. pp. 149-150.

[9] 2d Tr. p. 152.

[10] 2d Tr. pp. 142, 147, 149-152.

[11] 2d Tr. pp. 363-364.

petitioner's death sentence and remanded the case in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980); Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819 (1980).

Petitioner's motion for a full briefing and oral argument in the Supreme Court of Georgia was denied. Thereafter, petitioner's death sentence was reimposed by the Supreme Court of Georgia in an opinion filed September 24, 1980. Davis v. State, 246 Ga. 423, 271 S.E.2d 828 (1980). Again, a timely petition for writ of certiorari was filed with the Supreme Court of the United States and said petition was denied. Davis v. Georgia, 451 U.S. 921, 101 S. Ct. 2000, 69 L.Ed.2d 413 (1981).

On July 22, 1981, petitioner's original trial court reimposed a new execution date for the death sentence for August 3, 1981. On July 30, 1981, petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia and requested a stay of execution pending a hearing on his petition. The Superior Court of Butts County, the Honorable Alex Crumbley, granted petitioner's request for stay on July 30, 1981.

An evidentiary hearing was held before the Honorable Alex Crumbley on October 1, 1981. In an order dated February 5, 1982 and filed on February 8, 1982, petitioner's petition for writ of habeas corpus was denied by the Superior Court of Butts County. Petitioner filed a timely application for certificate of probable cause to appeal in the Supreme Court of Georgia which was denied on March 24, 1982. Petitioner then filed a motion for a hearing which was denied on April 8, 1982. The Georgia Supreme Court granted petitioner's motion to stay the remittitur for ninety (90) days from April 8, 1982.

No other or prior habeas corpus proceedings have been filed on behalf of petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner submits this court should grant a writ of certiorari to enable this court to review the numerous, substantial constitutional deprivations associated with petitioner's trial and sentencing proceedings.

The recent decision of Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981), brings the sentencing phase of a bifurcated trial within the meaning of the double jeopardy clause. The Georgia Supreme Court, however, in Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), has interpreted the Bullington reversal of the death penalty as "not based on double jeopardy . . ., but on the fact that the death sentence was disproportionate to the life sentence previously imposed." Id. p. 425. This inconsistency in interpretation, particularly in view of the fact that at petitioner's second sentencing trial, new aggravating circumstances were introduced, presents this court with an area of law desperately needing resolution; prior to the imposition of the "unique and irretrievable" penalty of death. Woodson v. North Carolina, 428 U.S. 280 at 281, 96 S. Ct. 2978, 49 L.Ed.2d 944.

This court has previously vacated petitioner's death sentence in light of its ruling in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980); Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819 (1980). The Georgia Supreme Court reimposed the death sentence thereafter by simply holding that the jury was "authorized" to impose the death sentence. Davis v. State, 246 Ga. 432, 271 S.E.2d 828 (1980). The Georgia Supreme Court has therefore acted inconsistently with this court's decisions of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909. 49 L.Ed.2d 859 (1976) and Godfrey v. Georgia, supra, in that the Georgia Supreme Court improperly

acted as a sentencing body where the Georgia scheme places that responsibility in the trial court and invalidated the automatic sentence review focused on by this court in Gregg. See, Stephens, No. 81-89, May 3, 1982, 50 L.W. 4472, where a question was certified to the Georgia Supreme Court concerning the automatic review under Georgia law. Certiorari should be granted to resolve the inconsistencies between this court's mandates of constitutional safeguards in capital cases and their actual application and administration by the Georgia courts.

Eddings v. Oklahoma, _____ U.S. _____, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), requires the definition of and the consideration of all relevant mitigating evidence and the weighing of mitigating evidence against evidence of aggravating circumstances in all capital cases. The instructions on mitigation approved in these decisions of the Georgia Supreme Court and in this case as well do not meet the requirements set forth in Eddings. Certiorari should be granted to resolve the inconsistency between this court's rulings on mitigating evidence and the practice of the Georgia courts.

Finally, this case presents the court with important questions concerning the use of statements obtained by interrogation without proof of compliance with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) and the "reasonably effective" assistance of counsel standard set forth by the Sixth and Fourteenth Amendments.

Petitioner submits that because of the presence of substantial, unreviewed error, and because of the further development of capital sentencing law, he stands sentenced today on the basis of unreliable trial and appellate proceedings which resulted in an unwarranted conviction and death sentence. This court cannot tolerate such a result, for reliability must be the hallmark of any capital proceeding. Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L.Ed.2d 392 (1980).

I. THE ADDITION OF NEW ACCUSATIONS OF AGGRAVATING CIRCUMSTANCES AT THE SECOND SENTENCING TRIAL SUBJECTS PETITIONER TO DOUBLE JEOPARDY.

Under the Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 69 L.Ed.2d 270 (1981), rationale, double jeopardy protections are applicable at the sentencing phase as well as at the trial phase. In Bullington, this court expressly provided that "the protection afforded by the double jeopardy clause to one acquitted by a jury is also available to him, with respect to the death penalty, at his retrial." Bullington, page S. Ct. 1862. The Georgia Supreme Court in Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981) stated that "we do not agree that the failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances." Godfrey, page S.E.2d 426. In so holding, the Georgia Supreme Court is in direct contradiction with this court's holding in Bullington.

Petitioner submits the rationale in Godfrey is erroneous in that it mistakenly states that the reversal in Bullington was "not based on double jeopardy, however, but on the fact that the death sentence was disproportioned to the life sentence previously imposed." Godfrey, page S.E.2d 425. Bullington, page S. Ct. 1860, provides that if a reversal is based on a ground other than the sufficiency of the evidence, it is proper to use the same aggravating circumstances on retrial. However, petitioner faced at his second sentencing trial an additional aggravating circumstance which was not found by the first sentencing trial. The first sentencing trial was the state's "one fair opportunity to offer whatever proof it could assemble" and the fact that the jury did not find the existence of the second aggravating circumstance is, contrary to the Georgia Supreme Court's Godfrey decision, an implied acquittal of that aggravating circumstance. Such an

acquittal goes to the sufficiency of the evidence and, under the Bullington rationale, submission to the jury of the new aggravating circumstance at the second sentencing trial puts the petitioner in jeopardy for an offense which he has already been acquitted.

As a result of the inconsistency between the Georgia Supreme Court's Godfrey decision and this court's Bullington decision and as a result of the habeas corpus trial court's reliance on Godfrey in denying petitioner's writ for habeas corpus, this court should grant petitioner a writ of certiorari.

II. THE INCLUSION OF THE NEW ACCUSATION OF AGGRAVATING CIRCUMSTANCES SO TAINTS THE SECOND SENTENCING JURY'S VERDICT AS TO REQUIRE THE DEATH SENTENCE TO BE VACATED.

As noted previously, the addition of a second aggravating circumstance at petitioner's second sentencing trial based upon the same evidence and the same witnesses as presented at the first trial constitutes a violation of petitioner's protection against double jeopardy. As such, the inclusion of the new aggravating circumstance so taints the verdict as to require the vacation of the death sentence.

The decision to impose the death sentence has been treated with particular scrutiny by the appellate courts. E.g. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976). The ultimate question regarding a death sentence is whether the jury which handed down the sentence was sufficiently guided in its deliberations to comply with the constitutional standards set forth in Furman.

This court's recent decision in Zant v. Stephens, No. 81-89 (May 3, 1982), 50 L.W. 4472, certified the following question to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" L.W., page 4474. The answer to be provided by the Georgia Supreme Court will determine for the court whether the Georgia capital sentencing system "would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster."

Petitioner contends that the addition of the second aggravating circumstance violates double jeopardy. Therefore, the question for this court is whether the death sentence imposed by a jury whose deliberations were impaired by the unconstitutional

imposition of the second aggravating circumstance, so taints the jury's imposition of the death penalty as to require the death sentence to be vacated. This court should grant a writ of certiorari to ensure that before a death sentence is imposed it was returned under the "deliberate, channeled guidelines required to eliminate constitutionally defective arbitrariness." Gregg, supra.

III. THE SUPREME COURT OF GEORGIA ACTED IMPROPERLY WHEN IT ACTED AS A SENTENCING BODY AND REIMPOSED PETITIONER'S DEATH SENTENCE AFTER REMAND WITHOUT ALLOWING PETITIONER TO BE HEARD OR SUBMITTING THE ISSUE TO A JURY FOR HEARING.

With respect to petitioner's first petition for a writ of certiorari, the Court remanded his case "for further consideration in light of Godfrey v. Georgia," but did not instruct the Georgia Supreme Court to put the matter before a newly convened sentencing jury. Mr. Justice Marshall's concurrence in Godfrey did suggest that a trial jury should be called:

> (I)t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards.

Godfrey v. Georgia, supra, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398,411 (emphasis in original).

On remand in this case, the Georgia Supreme Court, sua sponte decided against convening a new sentencing jury and further refused to take briefs or oral argument on any matter regarding petitioner's case, despite petitioner's request for briefing and oral argument. Simply holding that petitioner's "jury was authorized to find, . . . that the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman." (emphasis added) The Georgia Supreme Court reimposed the death sentence.

That disposition of the remand was improper, however, since it effectively deprived petitioner of a trial by a jury that was guided in the meaning of subsection (b)(7) of the Georgia statute. That subsection permits the jury to recommend a death sentence if they find that the murder was aggravated in that it was:

> outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim.

It is "impossible for (the Georgia Supreme Court) to say whether a particular jury . . . so exercised its discretion," Godfrey v. Georgia, supra, L.Ed.2d at 412, and applied a constitutionally limited interpretation to (b)(7). Nothing in the sentencing instructions given petitioner's jury:

> implie(d) any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible or inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

Godfrey v. Georgia, supra, L.Ed.2d at 406.

This Court has repeatedly held that no criminal sentence may be based merely on appellate speculation that a jury, faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. See, Chinarella v. United States, 445 U.S. 222, 100 S. Ct. 1108, 63 L.Ed.2d 348 (1980). This principle has been observed in death cases, where the Court has insisted that all "doubts . . . should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752, 68 S. Ct. 880, 92 L.Ed. 1055 (1948); accord, Calton v. Utah, 130 U.S. 83, 86-87 9 S. Ct. 435, 32 L.Ed. 870 (1889). Without assurance that the jury which sentenced the petitioner did so on the basis of a statute carefully fashioned to prevent arbitrary and capricious decisions, the petitioner's sentence to death should not have been reimposed.

IV. THE DENIAL BY THE SUPREME COURT OF GEORGIA OF PETITIONER'S REQUEST TO BE HEARD AND IN NOT RESUBMITTING THE ISSUE TO A JURY FOR A SENTENCING HEARING INVALIDATES GEORGIA'S AUTOMATIC SENTENCE REVIEW.

In upholding Georgia's death penalty statute, in Gregg, supra, this court focused on the automatic appeal to the Georgia Supreme Court as an important additional safeguard against the arbitrary and capricious imposition of the death penalty. 428 U.S. at 198, 204-206. However, this court in the recent case of Zant v. Stephens, supra, has raised serious questions as to its own reliance on the Georgia Supreme Court's automatic review process. Petitioner submits that the Georgia Supreme Court's review in his case did not and could not insure that jury discretion was controlled by clear and objective standards so as to eliminate the risk of arbitrary and capricious actions.

The Georgia Supreme Court is required under the sentencing review statute to consider whether the sentence was imposed under the influence of passion or prejudice. Georgia Code Annotated § 27-2537(c)(1). In one conclusory statement, without the basis for its conclusion, the Georgia Supreme Court dismissed this possibility. Davis v. State, 240 Ga. 423, 271 S.E.2d 828 (1980). As the court noted in its recurring on opinion "we recognize that the constitutionality of the Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing the capital sentences consistently with this concern." L.W., page 443.

It is apparent from the summary nature of the Georgia Supreme Court's opinion in this case that the automatic review afforded a defendant under this statute provides only an illusion of protection against arbitrary and capricious imposition of the death penalty. See the dissenting opinions of Mr. Justice Marshall joined by Mr. Justice Brennan in Zant v. Stephens, supra. As a

result, certiorari should be granted to consider whether this court's reliance on the Georgia Supreme Court's application of the Georgia automatic review process is misplaced.

V. THE JURY INSTRUCTIONS GIVEN AT THE SECOND SENTENCING TRIAL FAILED TO PROVIDE THE JURY WITH CONSTITUTIONAL GUIDELINES FOR ITS DELIBERATIONS AS THEY WERE INCOMPLETE, VAGUE AND OVERBROAD.

The jury instructions given at the second sentencing trial failed to provide the jury with constitutional guidelines for its deliberations as they were incomplete, vague and overbroad. The Eddings v. Oklahoma, _____ U.S. _____, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) decision requires that state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. In petitioner's second sentencing trial, the instructions leading to the death verdict against petitioner do not clearly express the need to weigh the petitioner's particular characteristics, as well as the specific circumstances of the crime. Further, the only attempt at any explanation by the trial court to guide and direct the jury on the meaning and definition of the term "mitigating" was as follows:

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moral culpability or blame.

In addition, this court's decisions--and a fair reading of the Constitution--call for more than a definition of "mitigating." They require that particular mitigating factors relevant in light of the record such as age and others, be called to the jury's attention as examples of what they could weigh against the aggravating circumstances which the court called to the jury's attention. (See also, the recent Fifth Circuit decision of Spivey v. Zant, _____ F.2d _____, No. 80-7243, where failure to so instruct the jury rendered the jury instructions constitutionally inadequate.)

In Gregg, the court assumed that such factors would be specifically called to the sentencing authority's attention. Under a fair reading of the constitutional requirements in death cases they clearly should be. In view of Eddings this court should grant certiorari in order to review the Georgia court's administration of evidence of mitigating circumstances.

VI. THE USE IN EVIDENCE OF THREE STATEMENTS BY PETITIONER WAS IMPROPER WHEN MIRANDA WARNINGS WERE NOT GIVEN UNTIL AFTER THE SECOND STATEMENT AND THE WARNINGS WERE INADEQUATE.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) requires that whenever an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning, he must be advised of his privilege against self-incrimination; his right to an attorney; and related rights. The right to Miranda warnings specifically includes statements which are meant to be exculpatory for they can also be highly incriminating.

The first time petitioner was questioned he was at his home. The second time, however, he had been taken to the Manchester, Georgia Police Station.[12] It is difficult to imagine that a young (19 year old) ill-educated man being questioned in rural Georgia about a rape-murder did not feel and suffer under the coercive atmosphere criticized in Miranda v. Arizona. The result of this second questioning was for petitioner to make a statement which was highly damaging and which was used against him at trial. Only after these admissions by the petitioner did the police then belatedly give Miranda warnings.

This second statement by petitioner was followed by a third interrogation where Miranda warnings were given prior to interrogation. However, neither the warnings given after the second statement or before the third statement were complete. Both times the police investigator gave the Miranda warnings from memory[13] and both times the investigator totally failed to advise petitioner that he had the right to have the interrogation cease *at any time even* after questioning began. Miranda v. Arizona, U.S. at 444-45, 473-74.

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[12] 2d Tr. p. 148.

[13] 2d Tr. p. 144.

The continuing, serial progression of these three statements from the petitioner--each of which implicate the petitioner more strongly--demonstrate the dramatic effect on petitioner and the impact at his death sentencing trial of the prosecution's failure to give timely or adequate Miranda warnings.

Finally, there is simply no evidence in this record to support a finding that this 19 year old youth waived his right to remain silent or his right to a lawyer. Proof of waiver by the state of Georgia should have included (but did not) proof of understanding of the rights and "comprehension" as well as "relinquishment." Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L.Ed.2d 424 (1975).

VII. TRIAL COUNSEL FAILED TO PROVIDE PETITIONER WITH EFFECTIVE ASSISTANCE.

Measured against the appropriate "reasonably effective" standard, petitioner did not receive constitutionally adequate legal assistance at his capital trial.

The "reasonably effective assistance" standard is inherently flexible. What is reasonable in one situation is not reasonable in another. In this case, petitioner was sentenced to die. In that situation, the Eighth Amendment, together with the Sixth and Fourteenth, establish a particularly high standard of reasonableness.

Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) 96 S. Ct. 2978, 49 L.Ed.2d 944 (plurality opinion). To satisfy this heightened need for reliability, this court has held that certain procedures which are not required by the Constitution in other criminal cases are nonetheless due in capital cases under the Eighth Amendment. Thus, the level of procedural fairness that the Due Process Clause of the Fourteenth Amendment (and all of its incorporated amendments) require as a reflection of the concerns of the Eighth Amendment in capital cases is higher than that required in non-capital cases. Compare Woodson v. North Carolina, supra, with McGautha v. California, 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971).

Accordingly, while a relatively high level of lack of preparation, error and neglect by counsel might satisfy the dictates of reasonableness in a non-capital case, it will not satisfy the higher degree of "reliability" that the Eighth Amendment demands of determinations "decisive (of) life . . . and . . . death." Gardner v. Florida, 430 U.S. 349, 359, 97 S. Ct. 1197, 51

L.Ed.2d 393 (1977) (plurality opinion). When a condemned man has not had consistently reliable assistance at his capital trial, therefore, "the state's criminal justice system has operated to deny (the) due process (required by the Eighth as well as the Sixth and Fourteenth Amendments) . . . and the state's consequent (execution) of the defendant is fundamentally wrong." Fitzgerald v. Estelle, supra, at 1336.

Petitioner did not receive "reasonably effective" or reliable assistance of counsel at his capital trial. Indeed, his lawyer's lack of ability to adequately prepare rendered the trial so fundamentally unfair that under any standard petitioner's constitutional rights were violated. As a consequence, a writ of certiorari should be issued for this court to review the application of the "reasonably effective" standard to petitioner's case.

VIII. CONCLUSION

For the foregoing reasons, petitioner respectfully submits that this court should grant his petition for a writ of certiorari to review the Supreme Court of Georgia's order denying his application for a certificate of probable cause to appeal the denial of petitioner's petition for writ of habeas corpus.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: _____
William J. Marett, Jr.

By: _____
Larry V. Woods

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Nashville, TN 37203
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Georgia has been placed with the U.S. Mail, postage prepaid, and addressed to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 and to Mike Bowers, Attorney General of the State of Georgia, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 4th day of JUNE, 1982.

_____
William J. Marett, Jr.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 81- 81 6854

FREDDIE DAVIS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Freddie Davis, who is now held in the Georgia Diagnostic and Classification Center in Jackson, Georgia, asks leave to file the attached petition for writ of certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached hereto.

This the 4th day of JUNE, 1982.

Respectfully submitted,

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: Larry D. Woods
Larry D. Woods

By: William J. Marett, Jr.
William J. Marett, Jr.

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Freddie Davis, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. I am currently incarcerated at the Georgia Diagnostic and Classification Center in Jackson, Georgia.

3. Because of my poverty I am unable to pay the costs of said cause.

4. I am unable to give security for the costs in this cause.

5. I believe that I am entitled to the relief that I seek in this action.

6. The nature of this action is briefly stated as follows:

I was sentenced to death by the state court in Georgia on the charge of murder and rape and I am presently incarcerated in the Georgia Diagnostic and Classification Center in Jackson, Georgia. The present proceeding is an application for writ of certiorari to the Supreme Court of Georgia which affirmed the denial of my petition for writ of habeas corpus based upon my claim that my federal constitutional rights have been violated as set forth in the petition for certiorari.

Freddie Davis Freddie Davis
FREDDIE DAVIS

Sworn to and subscribed
before me this 19th day
of April, 1982.

J. Michael Whitehead
Notary Public

My Commission Expires:
MY COMMISSION EXPIRES MARCH 21, 1985

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been placed with the U.S. Mail, postage prepaid, and addressed to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 and to Mike Bowers, Attorney General of the State of Georgia, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 4th day of June, 1982.

William J. Marett, Jr.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-81 6854

FREDDIE DAVIS, Petitioner,

v.

STATE OF GEORGIA, Respondent.

APPENDIX TO PETITION FOR
A WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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Larry D. Woods

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Counsel for Petitioner

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

FREDDIE DAVIS, PETITIONER VS. WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, RESPONDENT	:	HABEAS CORPUS FILE NO. 5193

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Meriwether County. Petitioner was convicted of murder and rape. He was sentenced to death for the murder and was given a life sentence for rape. The Supreme Court affirmed the convictions but vacated the death sentence and required a new trial on the issue of punishment for murder. Davis v. State, 240 Ga. 763 (1978). Upon retrial Petitioner was given a death sentence, which was affirmed by the Supreme Court. Davis v. State, 242 Ga. 901 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey.[1] Upon reconsideration

[1] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

the Supreme Court reaffirmed the death sentence. Davis v. State, 246 Ga. 432 (1980). Certiorari was denied by the Supreme Court of the United States.

The petition contains 33 numbered counts, of which 14 allege substantive claims for relief (19-32). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the petition.

The record in this case consists of the transcript of the proceedings before this Court on October 1, 1981, and the transcript and record of Petitioner's trials in the Meriwether County Superior Court.

19.

In paragraph 19, Petitioner contends he was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and corresponding provisions of the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at both trials and on appeal by Ted A. Schumacher. (H.T. 56, 78). Mr. Schumacher graduated from Duke University Law School in 1971. (H.T. 48). From 1971 until 1975, he served in the U. S. Army JAG Corps. Id. Since 1975, he has been in private practice in Columbus, Georgia. (H.T. 49). Prior to Petitioner's trial, Counsel had

been involved in approximately sixty criminal cases. (H.T. 55). He had assisted in a murder trial three months prior to Petitioner's trial. (H.T. 51). This was his first murder trial. Id.

Petitioner initially had refused appointed counsel and had engaged Steve Fanning to represent him. (H.T. 29-30, 59). Mr. Fanning represented Petitioner at his preliminary hearing. (H.T. 30, 59). Subsequently, some problems arose over Mr. Fanning's fee, so Mr. Schumacher was retained seven days prior to Petitioner's trial. (H.T. 56, 59).

Mr. Schumacher moved for a continuance, but the motion was denied. (H.T. 57).

Counsel met with Petitioner at least once prior to trial, and they discussed the circumstances of the offense, Petitioner's life, and his history. (H.T. 8, 57). Counsel testified that he spent seven days and nights preparing and researching areas that he knew would be important, such as blood, tests, hair tests, rape, and evidence. (H.T. 58). Counsel traveled to the scene of the crime in Manchester and talked with people there. Id. He had made arrangements with Petitioner's family to gather as many people as they thought could have helpful information or serve as character witnesses, and Counsel met with them at the home of Petitioner's family. (H.T. 59). Counsel also went to the gas station where Petitioner said his hand had been cut and talked with

people about that. Id. Counsel testified that he talked to as many people that had been suggested by the family as he could while also trying to prepare for trial. (H.T. 60). He found people who would testify and others who would not, a minister in particular. (H.T. 81, 83). Counsel observed the trial of Petitioner's co-defendant and the State's evidence, some of which was introduced at Petitioner's trial. (H.T. 59). Counsel also discussed the case with Mr. Fanning, mainly Petitioner's statements to police. (H.T. 59-60).

Counsel stated that time constraints forced him to make certain decisions. (H.T. 61). He felt certain the trial judge would deny a continuance, so that he would have to be ready for trial; accordingly, Counsel did as much research as he could. Id. He also decided against filing a change of venue motion because it would be too time-consuming but did question jurors on voir dire about pretrial publicity. (H.T. 87-88).

Counsel investigated the circumstances in which Petitioner's hand had been cut but did not try to find the bandage that had been removed. (H.T. 59, 61). Counsel did not want to overemphasize the fact that some blood samples from the crime scene matched Petitioner's blood group. (H.T. 62-63). He also did not think it wise to get the circumstances of the cut

(Petitioner had been in a knife fight three or four days before the murder) before the jury. (H.T. 82).

Counsel testified there was never an offer from the district attorney's office of a life sentence if Petitioner would reveal the identity of a third suspect. (H.T. 85). Counsel told Petitioner that if there were a third party involved and if Petitioner would talk about it, it certainly could not hurt and probably would help him. Id.

Prior to the first trial, Counsel filed motions (R.I, 5-21). He had prepared a motion for individually sequestered voir dire and presented a copy to the prosecutor and trial judge at the pretrial motions hearing. (H.T. 86). Off the record, they advised Counsel against filing the motion because the people of that area would not understand and would think he was hiding something, so Counsel did not file it. Id.

At the first trial, Counsel made an opening statement (T.I, Vol. II, 94-97); cross-examined State witnesses (T.I, Vol. I, 189; 221; Vol. II, 14; 32; 48; 80; 220); made motions (T.I, Vol. I, 209; Vol. II, 85); presented ten witnesses in the guilt/innocence phase, including Petitioner (T. I, Vol. II, 99: 105; 116; 128; 135; 138; 141; 185; 216); gave closing argument in the guilt/innocence phase (T.I, Vol. II, 223-240); did not present additional evidence in the sentencing phase, but asked the jury to consider the Petitioner's testimony (T. I, Vol. II, 265) and gave closing argument (T. I, Vol. II, 277-283).

At the resentencing trial, Counsel gave an opening statement (T. II, Vol. I, 97-101); cross-examined State witnesses (T. II, Vol. I, 142; 158; Vol. II 136; 196; 217; 229; 240; 260); made motions (T. II, Vol. I, 156; Vol. II, 289; 315); and gave closing argument (T. II, Vol. II, 316-353).

At the resentencing trial, the State had not called Petitioner's co-defendant to testify before resting its case. (H.T. 65). Counsel rested its case, without presenting any evidence or witnesses, as a tactic to surprise the district attorney. (H.T. 66). After a lunch recess, the State moved to reopen its case to present the testimony of Petitoner's co-defendant. (T. II, Vol. II, 252-253). Over Counsel's objection, the trial court allowed the State to reopen its case. (T. II, Vol. II, 253-254). Counsel stated the testimony of the co-defendant was worse at the second trial than at the first trial, Counsel had no rebuttal and felt that the evidence he had would not have much effect, so he did not present any witnesses. (H.T. 66). Instead, he concentrated on attacking the co-defendant's testimony in his closing argument. Id.

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d. 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective because he was without sufficient time to confer with Petitioner to develop his defense. Counsel was retained seven days prior to the date of the trial. He moved for a continuance, but it was denied. As a result, Counsel stated that he did everything he could within the time allotted to be ready for trial. Counsel met with Petitioner at least once prior to trial, and they discussed the circumstances of the offense as well as Petitioner's life and history. Petitioner has not shown there was a defense available which was not presented.

Petitioner has also claimed Counsel was ineffective for not investigating circumstances in which Petitioner's hand had been cut prior to the crime and for not obtaining the bandage that had been on his hand to use as evidence.

Counsel testified that he went to the gas station where Petitioner's hand had been cut in a knife fight and talked to people there. Counsel purposely decided not to emphasize the incident because of its potential adverse effects. The Court finds this decision to have been a tactical decision which is the

exclusive province of a lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975) The Court does not find Counsel ineffective for this reason.

Petitioner has also alleged counsel was ineffective for not moving to suppress Petitioner's three statements to police. In that the Supreme Court has concluded the statements were admissible (see paragraphs 20-23), the Court does not find Counsel ineffective for failing to object.

Similarly, the Court does not find Counsel ineffective for failing to object to the additon of the (b)(7) aggravating circumstance or to the jury charge on mitigating circumstences. (See paragraphs 27-31).

Petitioner has also claimed Counsel was ineffective for failing to call as character witnesses individuals Petitioner had suggested. Counsel testified that he talked to as many people as he could and found both people willing to testify and those who would not. Counsel did call some of the people suggested by members of Petitioner's family. (H.T. 34; 40).

Finally, Petitioner contends Counsel was ineffective for not calling certain witnesses to testify as to pressure brought upon Petitioner's co-defendant to testify at the resentencing trial. However, Petitioner has made no showing that these witnesses were available or could have impeached the testimony of the co-defendant.

Accordingly, this claim for relief is found to be without merit.

20, 21, 22, 23

In paragraphs 20-23, Petitioner claims that the

admission into evidence of his three statements to police violated his constitutional rights.

FINDINGS OF FACT

The Supreme Court has already concluded Petitioner's first two statements were clearly admissible as statements made prior to any in-custodial interrogation. Davis v. State, 242 Ga. at 904.

Furthermore, the Supreme Court also reviewed the evidence submitted to the trial court at the Jackson-Denno hearing to determine the admissibility of the third statement. Davis v. State, 242 Ga. at 905. The Court upheld the trial court's determination that the statement was freely and voluntarily made and, therefore, admissible. Id.

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974); Stephens v. Balkcom, 245 Ga. 492(2) (1980).

Accordingly, this allegation is found to be without merit.

24, 25, 26

In paragraphs 24-26, Petitioner alleges the prosecutor made an improper closing argument at the resentencing trial which violated Petitioner's right to due process of law and right to remain silent.

FINDINGS OF FACT

The Court has examined the closing argument of the prosecutor. (T. II, Vol. II, 289-315).

CONCLUSIONS OF LAW

A prosecutor may comment on a defendant's failure to produce evidence. Wood v. State, 234 Ga. 758(2)(1975); White v. State, 242 Ga. 21(5)(1978). Thus, the prosecutor's comment upon Petitioner's failure "to repute or dispute or rebute any evidence that we have submitted" (T. II, Vol. II, 314) was not improper.

A prosecutor may also argue for a death sentence and offer plausible reasons for his position. Allen v. State, 187 Ga. 178, 182 (1938); Strickland v. State, 209 Ga. 675(2)(1953); Chenault v. State, 234 Ga. 216, 224 (1975). He may urge severe punishment. Bailey v. State, 153 Ga. 413(4)(1922); Chenault v. State, supra.

The Court finds the prosecutor did not exceed the bounds of permissible argument. Leutner v. State, 235 Ga. 77, 84 (1975); Chenault v. State, supra; Redd v. State, 242 Ga. 876 (4)(1979).

Accordingly, this claim for relief is found to be without merit.

27, 28, 29, 30, 31

In paragraphs 27-31, Petitioner contends that the jury instructions and proceedings at his resentencing

trial violated his constitutuional rights. Specifically, he claims the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance was unconstitutionally applied; that the finding of the (b)(7) aggravating circumstance at his resentencing trial violated the Fifth Amendment ban against double jeopardy; that the reimposition of the death sentence by the Supreme Court upon remand was improper; and, that the jury instructions on mitigating circumstances were deficient.

FINDINGS OF FACT

At Petitioner's first trial, the jury was instructed upon and found the existence of the Ga. Code Ann. §27-2534.1(b)(2) aggravating circumstance. (R.1, 3-4; 25-27).

At the resentencing trial, the jury was instructed upon and found the existence of the (b)(2) and (b)(7) aggravating circumstances. (R. 11, 6-7; 20-23).

Upon remand for reconsideration in light of Godfrey v. Georgia, supra, the Supreme Court expressly upheld the finding of the (b)(7) aggravating circumstance in this case. Davis v. State, 246 Ga. at 434.

CONCLUSIONS OF LAW

Contrary to Petitioner's assertion, the Supreme Court has already concluded the (b)(7) aggravating circumstance was constitutionally applied. Implicit in this finding would be the conclusion that the jury instructions sufficiently channeled the jury's discretion.

As to his second ground, Petitioner relies upon Bullington v. Missouri, ____ U.S. ____, 101 S.Ct.___, 68, L.Ed.2d 270 (1981), to assert the State was barred by the Fifth Amendment double jeopardy clause from introducing the (b)(7) aggravating circumstance at the resentencing trial because it was not sought at his first sentencing trial.

Bullington is distinguishable upon its facts from the case at bar in that "in Bullington there was a life sentence imposed at the first sentencing procedure whereas in the instant case a death penalty was imposed. Therefore, the danger of repeated attempts by the State to wear a defendant down and obtain the desired result is not present." Godfrey v. State, _____Ga. _____ (No. 37683, 37684, November 24, 1981), slip op. at 5.

The Court in Godfrey held that the State is not limited to the aggravating cirsumstances relied upon at the first sentencing trial. "We do not agree that failure to submit aggravating circumstances which are raised by the evidence is an implied directed verdict of acquittal on these aggravating circumstances." Godfrey v. State, supra, slip op. at 6.

Under the rule announced in Godfrey, Petitioner's rights were not violated by the State's introduction of the (b)(7) aggravating circumstance at his resentencing trial.

Thirdly, the Court is aware of no requirement that Petitioner be heard when the Supreme Court reconsiders

a death sentence upon remand.

Finally, the Court has examined the jury instructions given at the resentencing trial. (T. 11, Vol. 11, 353-362). The trial judge clearly defined mitigating circumstances and told the jury what the functions of mitigating circumstances would be in their deliberations. The charge meets the requirements laid out in Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, the allegations in paragraphs 27-31 are found to be without merit.

32

In paragraph 32, Petitioner claims that his Eighth and Fourteenth Amendment rights were violated by the failure of the appellate courts to review his sentence and determine that it falls into the category of "most extreme cases" in which the death penalty is justified.

The appellate review procedures under Georgia's death penalty statute have been held constitutional. Smith v. Balkcom, 660 F.2d 573 (1981).

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the petition having been found to be without merit, the petition is hereby denied.

SO ORDERED, this 5 day of February, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1996

SUPREME COURT OF GEORGIA

ATLANTA, March 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Freddie Davis v. Walter D. Zant, Warden

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Applic. No. 1996

SUPREME COURT OF GEORGIA

ATLANTA, April 8, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

FREDDIE DAVIS V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this Application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Gaither, Legate Clerk.

Application No. 1996

SUPREME COURT OF GEORGIA

ATLANTA, April 8, 1982

The Honorable Supreme Court met pursuant to adjournment.

XXXXXXXXXXXXXXXXXXXXXX

By Smith, J.

The following direction was given:

FREDDIE DAVIS V. WALTER D. ZANT, WARDEN

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's order rendered in this case on 3-24-82, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

George T. Smith
George T. Smith, Justice

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Appendix to Petition for A Writ of Certiorari to the Supreme Court of Georgia has been placed with the U.S. Mail, postage prepaid, and addressed to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 and to Mike Bowers, Attorney General of the State of Georgia, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 4th day of JUNE, 1982.

William J. Marett, Jr.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

FREDDIE DAVIS, Petitioner,	)	
v.	)	No. 81-6854
STATE OF GEORGIA, Respondent.	)	

PETITION FOR REHEARING

Larry D. Woods
William J. Marett, Jr.

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Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

FREDDIE DAVIS, Petitioner,	)	
v.	)	No. 81-6854
STATE OF GEORGIA, Respondent.	)	

PETITION FOR REHEARING

On the basis of this court's decision in Zant v. Stephens, No. 81-89 (May 3, 1982), petitioner Freddie Davis respectfully moves this court for an order:

1.

Vacating the denial of petitioner's writ of certiorari entered on October 4, 1982.

2.

Granting petitioner's petition for writ of certiorari to review the judgment of the Supreme Court of the State of Georgia denying petitioner's application for a certificate of probable cause to appeal the denial of his petition for writ of habeas corpus.

In Zant v. Stephens this court certified the following question to the Supreme Court of the State of Georgia:

> What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

The circumstances of Zant are very similar to petitioner's. In Zant, the defendant was found guilty of murder and sentenced to death based upon the jury's finding three specific

aggravating circumstances. On appeal, the Georgia Supreme Court set aside one of the three statutory aggravating circumstances found by the jury. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied 429 U.S. 986 (1976). The Georgia Supreme Court upheld the death sentence, however, on the grounds that the evidence supported the jury's findings of the other statutory aggravating circumstances and subsequently the death sentence was not impaired. 237 Ga. at 261-262, 227 S.E.2d at 263.

Upon writ of federal habeas corpus, the United States Court of Appeals for the Fifth Circuit reversed the district court's denial of habeas corpus insofar as it left standing the petitioner's death penalty and remanded it for further proceedings. 631 F.2d 397, 407 (5th Cir. 1980), modified, 648 F.2d 446 (1981). Upon the granting of the state's petition for certiorari, this court determined that there was considerable uncertainty about the state-law premises of the Georgia rule that the failure of one aggravating circumstance does not so taint the proceedings as to invalidate other aggravating circumstances and the sentence of death. This court declined to rule on the validity of the Georgia rule but stated that the uncertainty surrounding it might undermine the confidence expressed in the Georgia capital sentencing system which was upheld in Gregg v. Georgia, 428 U.S. 153 (1956). Therefore, the court remanded the case to the Georgia Supreme Court for the determination of the certified question.

The facts in the Stephens v. Zant case are very similar to petitioner's case. At petitioner's first sentencing trial, the state alleged only the "aggravating circumstance" of "commission of an additional capital felony, to wit, rape" and on that basis the jury recommended the death verdict. After the reversal of the death sentence on direct appeal, Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978), at the new sentencing trial, the state added the allegation of "aggravating circumstances" that the offense was

"outrageously, wantonly vile, inhuman and involved torture and depravity of the mind . . . and aggravated battery." The addition of this second allegation involved no new evidence and in fact resulted in the use of the same witnesses and the same testimony as at the first trial. Petitioner's death sentence was then vacated in light of this court's ruling in Godfrey v. Georgia, Davis v. Georgia, 446 U.S. 961, 100 S. Ct. 2934, 64 L.Ed.2d 819 (1980). However, the Georgia Supreme Court reimposed the death sentence thereafter by simply holding that the jury was "authorized" to impose the death sentence. Davis v. State, 246 Ga. 432, 271 S.E.2d 828 (1980). Petitioner, in his petition for certiorari, questioned the validity of the Georgia Supreme Court's actions in light of Gregg v. Georgia, Godfrey v. Georgia and Zant v. Stephens.

Petitioner believes that in order to properly determine the issues raised in his petition for certiorari, this court must reserve a decision until it has received the answer to the question certified to the Georgia Supreme Court in Stephens v. Zant and has ruled upon the validity of the Georgia rule holding that failure of one aggravating circumstance does not invalidate a death penalty based on other aggravating circumstances.

So as to avoid any further delay in a full and complete hearing of these claims, and in light of this court's ruling in Stephens v. Zant, petitioner prays for a rehearing and that the writ of certiorari issue.

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: _____
Larry D. Woods

By: _____
William J. Marett, Jr.

121 17th Avenue South
Nashville, TN 37203
(615) 259-4366

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for Rehearing has been placed with the United States Mail, postage prepaid, and addressed to Mike Bowers, Attorney General, State of Georgia, and to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this the 14th day of October, 1982.

William J. Marett, Jr.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

FREDDIE DAVIS, Petitioner,	)	
v.	)	No. 81-6854
STATE OF GEORGIA, *Respondent.*	)	

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 51.2 and that this petition for rehearing is presented in good faith and not for delay.

This the 14th day of October, 1982.

WOODS, BRYAN, WOODS & WATSON
A Professional Law Association

By: Larry D. Woods
Larry D. Woods

121 17th Avenue South
Nashville, TN 37203
(615) 259-4366

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Certificate of Counsel has been placed with the United States Mail, postage prepaid, and addressed to Mike Bowers, Attorney General, State of Georgia, and to Mary Beth Westmoreland, Assistant Attorney General, Attorney General's Office, 132 State Judicial Building, 40 Capitol Square, Atlanta, GA 30334 on this 14th day of October, 1982.

Larry D. Woods

No. 81-6854

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FREDDIE DAVIS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
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132 State Judicial Bldg.
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QUESTIONS PRESENTED

1.

Whether the addition of a new aggravating circumstance at Petitioner's resentencing trial did not amount to a double jeopardy violation.

2.

Whether the actions by the Supreme Court of Georgia on remand from this Court were proper.

3.

Whether the jury instructions at the second sentencing trial properly instructed the jury as to its consideration of the death penalty.

4.

Whether statements made by the Petitioner were properly admitted at trial.

5.

Whther Petitioner received effective assistance of counsel at trial.

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TABLE OF AUTHORITIES

No. 81-6854

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FREDDIE DAVIS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PART ONE

STATEMENT OF THE CASE

Petitioner, Freddie Davis, was indicted in Meriwether County, Georgia, for the rape and murder of Frances Coe. Eddie Spraggins was also indicted and convicted of this offense. Petitioner was tried by a jury and found guilty of both offenses. At Petitioner's original trial in 1977, he was sentenced to life for rape and to the death penalty for the offense of murder based on a finding of Ga. Code Ann. § 27-2534.1(b)(2).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions for murder and rape, as well as the life sentence for rape were affirmed. Davis v. State, 240 Ga. 763, .43 S.E.2d 12 (1978). The Supreme Court of Georgia determined that the trial court's sentencing instructions did not fully explain the consideration of the death penalty to the jury. Thus, the Georgia Supreme Court reversed the death penalty for the offense of murder

and ordered a new trial on the issue of punishment.

A new jury was selected in Meriwhether County and the State presented the same evidence as had been presented in the original trial. At this second sentencing trial, the State sought the death penalty based on Ga. Code Ann. §§ 27-2534.1(b) (2) and (7). The jury once again imposed the death penalty and found that both of the statutory aggravating circumstances existed beyond a reasonable doubt.

The case was again presented to the Supreme Court of Georgia on direct appeal from the resentencing hearing. The Supreme Court of Georgia considered the sentence and affirmed the sentence as found by the trial court. Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). Petitioner subsequently filed a petition for a writ of certiorari in this Court challenging that decision. On May 27, 1980, this Court ordered that the judgment of the Supreme Court of Georgia be vacated insofar as it left the death penalty undisturbed and remanded the case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980).

On remand, the Supreme Court of Georgia again affirmed Petitioner's death sentence. The Court found that there was sufficient evidence to support a finding beyond a reasonable doubt of the seventh aggravating circumstance and also noted that the death sentence could be upheld upon the finding of the second aggravating circumstance. Davis v. State, 246 Ga. 432, 271 S.E.2d 828 (1980). Petitioner again filed for a petition for a writ of certiorari in this Court. This petition was denied on April 20, 1981 and a rehearing was denied on June 1, 1981. Davis v. Georgia, ___U.S.___, 68 L.Ed.2d 312 (1981).

A petition for a writ of habeas corpus was filed in the Superior Court of Butts County in July, 1981. A hearing was held on the petition on October 1, 1981. After briefs were filed by counsel for both parties, that Court denied habeas corpus relief on February 5, 1982. An application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on March 24, 1982. An application for rehearing was also denied by that Court.

Petitioner has now filed the instant petition for a writ of certiorari in this Court challenging the decision by the habeas corpus court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE ADDITION OF A NEW AGGRAVATING CIRCUMSTANCE AT PETITIONER'S RESENTENCING TRIAL DID NOT AMOUNT TO A DOUBLE JEOPARDY VIOLATION.

Petitioner has asserted that his rights under the double jeopardy clause have been violated by the addition of a second aggravating circumstance at his resentencing trial. In support of this allegation, Petitioner cites to the decision of this Court in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981).

In the instant case, Petitioner was first tried in 1977. At that time only one aggravating circumstance was presented to the jury for its consideration. The jury found the existence of this aggravating circumstance and imposed the death penalty. At the resentencing hearing, the state again sought the death penalty based on this aggravating circumstance and added the seventh aggravating circumstance. No new evidence was presented by either party at that time. The jury then returned a finding of both aggravating circumstances and imposed the death penalty. Respondent submits that under these circumstances, Petitioner's rights under the double jeopardy clause were not violated.

This same issue has been considered by the Supreme Court of Georgia in two other cases and was addressed by the state habeas corpus court in this case. See Zant v. Redd, 249 Ga. 211, ___S.E.2d ___ (1982); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981). In both of those decisions the court considered

the application of this court's decision in Bullington v. Missouri, to cases in which additional aggravating circumstances are presented at a second trial.

In Godfrey the defendant had initially been convicted of murder and received the death penalty based upon the jury's finding of the existence of the seventh aggravating circumstance. After reversal by this Court, the jury was allowed to consider the second aggravating circumstance on resentencing and returned a finding of the death penalty. On appeal, the Supreme Court of Georgia considered the double jeopardy issue and determined that the state was not limited to the aggravating circumstances relied upon at the first sentencing trial. The court specifically noted that the failure to submit aggravating circumstances was not in any manner an implied directed verdict of acquittal on those circumstances. This Court denied certiorari in that case on April 5, 1982 and denied rehearing on May 24, 1982.

In Zant v. Redd, an additional aggravating circumstance was presented to the jury on resentencing. The Supreme Court of Georgia considered again the decision in Bullington by this Court and determined that there was no double jeopardy violation presented.

In considering the decision in Bullington v. Missouri, it appears that the basis of this Court's holding is that the procedure used under Missouri's death penalty statute closely resembles that of a trial on guilt or innocence. This Court indicated that this sentencing procedure required the jury to determine if the state had actually proved its case when seeking to impose the death penalty. Thus, a sentence of life in that case actually amounted to an acquittal of the death penalty.

Respondent asserts that, as found by the Supreme Court of Georgia, this reasoning does not apply to aggravating circumstances. There is no alternative process in the jury's consideration of aggravating circumstances. Under the statute in Georgia, there is only a requirement that the jury find one aggravating circumstance in order to impose the death penalty. Ga. Code Ann. § 27-2534.1(c). Zant v. Redd at 213. In the instant case, the jury was so instructed. Thus, the decision by the jury is not a mutually exclusive one as it is with regard to the choice of life or death. Thus, it cannot actually be said that the failure of the jury to find a particular aggravating circumstance is an acquittal. Further, under Georgia law, the state and defense start anew at a resentencing hearing. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Godfrey v. State at 619. In that case, the Supreme Court of Georgia found that under Georgia law, the failure to submit aggravating circumstances is not an implied directed verdict of acquittal on these circumstances.

Thus, Respondent asserts that, even under the holding of this Court in Bullington, supra, there has been no implied directed verdict of acquittal on the aggravating circumstance not submitted to the jury at the first sentencing proceeding. Therefore, there was no error in submitting a new aggravating circumstance at the resentencing proceeding. This does not constitute a double jeopardy violation as there is no requirement that the jury make a specific finding as to the presence or absence of a particular aggravating circumstance as long as the jury finds the presence of one aggravating circumstance. Therefore, Respondent asserts that there is no constitutional issue presented by this allegation.

Petitioner also indicates that this issue should be considered in light of this Court's consideration of the case of Zant v. Stephens, 50 U.S.L.W 4472 (May 3, 1982). This case is clearly distinguishable from that case. In Stephens, the Court is faced with a consideration of the effect of a finding that one statutory aggravating circumstance found by the jury is unconstitutional. As Respondent has previously shown that no double jeopardy violations were presented, there is clearly no issue presented similar to the Stephens case.

II. THE ACTIONS BY THE SUPREME COURT OF GEORGIA ON REMAND FROM THIS COURT WERE PROPER.

Petitioner challenges the actions of the Supreme Court of Georgia when it considered the Petitioner's sentence after remand from this Court. This Court had remanded the case for reconsideration in light of Godfrey v. Georgia, supra. See Davis v. Georgia, 446 U.S. 961 (1980). On remand the Supreme Court of Georgia did not take additional argument or briefs, but merely reconsidered the record before it. The court determined that the death penalty was proper and reaffirmed the death sentence. The Petitioner complains that the Supreme Court of Georgia should have ordered a new jury trial on the issue of sentence and was not authorized to act as a de novo sentencing authority. It should be noted that the issues encompassed in this allegation were raised in the petition for a writ of certiorari to this Court following the decision by the Supreme Court of Georgia.

Under Ga. Code Ann. § 27-2537, the Supreme Court of Georgia is directed to conduct an appellate review of the sentence imposed by the trial court. The court is given specific areas in which it must evaluate the sentence. The court is then authorized, among other alternatives, to affirm the sentence of death. Ga. Code Ann. § 27-2537(e)(1). On its first review of the death penalty imposed at the resentencing trial, the Supreme Court merely noted that both of the aggravating circumstances were supported by the evidence. Davis, 242 Ga. at 908. The court did not set forth a detailed examination of the aggravating circumstances. This Court did not reverse the death penalty, but merely remanded the case for additional review by the Supreme Court of Georgia. Therefore, on remand the Supreme Court of Georgia was only conducting its appellate review under Ga. Code Ann. § 27-2537. The court did not reimpose the death sentence, but merely reaffirmed the death sentence previously imposed by the Superior Court of Meriwether County. As the court was merely conducting its appellate review, there was no requirement that the court send the case back for a new jury sentencing procedure. Furthermore, as the court was only considering the record before it on an issue previously addressed, there was no requirement that the court allow additional briefs to be filed.

III. THE JURY INSTRUCTIONS AT THE SECOND SENTENCING TRIAL PROPERLY INSTRUCTED THE JURY AS TO ITS CONSIDERATION OF THE DEATH PENALTY.

Petitioner asserts that the jury instructions in the instant case were incomplete and did not instruct the jury properly as required by this Court under Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982).

The court began its charge by stating that the law provides for a trial judge to instruct the jury concerning any evidence in extenuation, mitigation and aggravation. (T. 354). The court told the jury that they were authorized to consider all of the evidence presented in open court. The court specifically charged the jury, "In reaching your verdict, you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the state and the defendant throughout this trial." (T. 355). The court specifically instructed the jury to consider all of these factors in determining if there was mitigating evidence. The court went on to charge the jury as follows:

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the morale [sic], culpability or blame.

> In reaching this verdict, you are not required to find mitigating circumstances in order to recommend a sentence of life imprisonment. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.
>
> Ladies and Gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of law. (T. 355-6).

The Court then went on to charge as to the specific aggravating circumstances presented and told the jury that if they found that the state had proved one of the statutory aggravating circumstances beyond a reasonable doubt, they could recommend a death penalty, but were not required to do so. (T. 358).

Based on the foregoing, it is clear that the charge as given to the jury does not have any of the constitutional deficiencies alleged by the Petitioner. It is not required under Georgia law that specific mitigating circumstances be set forth. The jury was clearly charged that they were to consider all facts and circumstances presented. Furthermore, the jury would clearly have that understanding as the only purpose served by this jury was to make a determination as to sentence. The jury, thus, certainly understood that all

evidence presented to it was to be used in determining whether or not the death penalty was appropriate.

Petitioner asserts that the recent decision of the Fifth Circuit Court of Appeals in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), requires that a court set forth examples of mitigating circumstances for the jury to consider. A close reading of that decision clearly shows that no such finding was made by the court. As a matter of fact, the court specifically noted in a footnote that it did not decide whether a trial court was required to identify particular mitigating circumstances. Id., 661 F.2d at 469, n. 3. No finding has ever been made by a court requiring that specific mitigating instructions be enumerated. The only requirement is that the jury know that they are allowed to consider any evidence presented in mitigation.

It is clear from the instant charge that the court did define mitigating circumstances to the jury and explained the term sufficiently for the jury's consideration. Thus, there is no constitutional issue presented for review by this Court.

IV. STATEMENTS MADE BY THE PETITIONER WERE PROPERLY PRESENTED AT TRIAL.

Petitioner complains of the admission of statements at trial that he had made to the authorities. He asserts that his Miranda rights were violated concerning these statements, in particular asserting that he was not advised of his rights prior to the first two statements and that there was no showing that the third statement was voluntary.

On the initial direct review of Petitioner's conviction, the Supreme Court of Georgia considered Petitioner's allegation that his third statement was improperly admitted. The Court determined that there was no merit to Petitioner's allegation that he did not know the nature of the crime for which he was under arrest at the time of making this statement. On review of Petitioner's case after resentencing, the Court again considered the admissibility of the statements. The court specifically found that the Petitioner was not in custody when the first two statements were made, and these statement were properly admitted at trial. Davis v. State, 242 Ga. at 904. Miranda comtemplates a custodial interrogation type of situation before there is any requirement that these warnings be given. As the Supreme Court of Georgia made a proper factual finding that there was no custodial interrogation at the time of the making of these two statements, there was no requirement that the Miranda warnings be given.

A Jackson v. Denno hearing was held at trial and the Supreme Court of Georgia consider this hearing when determining the admissibility of the third statement. The Court found that the factual findings made by the trial court were supported by the evidence and that the statement was properly admitted. The facts in this case clearly support a finding that the statement was

freely and voluntarily made by the Petitioner after a knowing relinquishment of his constitutional rights. In considering the totality of the circumstances, it is apparent that this statement was properly admitted at trial. See Clewis v. Texas, 386 U.S. 707 (1967) and Lego v. Twomey, 404 U.S. 477 (1972). Thus, Respondent asserts that there is no federal constitutional question presented for review by this Court in this allegation.

V. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has asserted that he received ineffective assistance of counsel at trial due to his attorney's inability to adequately prepare for the case. Petitioner challenged this issue in the state habeas corpus court and it was decided adversely to him.

It is well recognized that effective assistance of counsel is considered to mean "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981); MacKenna v. Ellis, 286 F.2d 592, 599 (5th Cir. 1970); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). In considering this allegation, it is necessary to have an overall view of the representation of the Petitioner by his trial counsel. Petitioner had indicated that he did not want a state appointed attorney and informed the trial court that he did not want the attorney appointed for him. Mr. Steve Fanning represented the Petitioner during the committal hearing in this matter. After problems arose concerning Mr. Fanning's fee, Petitioner's family retained Mr. Ted Schumacher to represent him. He was retained approximately seven days prior to trial.

Mr. Schumacher had been practicing law since 1971, including practice in the Army as a member of the Judge Advocate General Corps. During this time he participated in some 200 court martial cases. Mr. Schumacher had represented some 60 defendants in felony cases in the Georgia courts.

Counsel requested a continuance due to the time constraints placed upon him, but this was denied by the trial court. Mr. Schumacher met with the Petitioner two times prior to trial and talked with him about the offense, his history and life. Mr. Schumacher spent seven days and nights prior to the trial researching areas which were relevant to the trial including blood tests, hair tests, rape and evidence. He traveled to the crime scene and talked with various witnesses there. He made arrangements with Petitioner's family to gather as many witnesses as possible and then went and talked with these witnesses. Petitioner's co-defendant was tried during this time and Mr. Schumacher attended that trial. The evidence was generally the same at both trials. Mr. Schumacher further discussed the case with Steve Fanning.

Mr. Schumacher presented numerous witnesses on Petitioner's behalf at the first trial and continued to represent the Petitioner on direct appeal and at the second sentencing trial. He talked with the Petitioner prior to the second trial. He did not call any witnesses in mitigation at the second trial because the state had not called Petitioner's co-defendant. Mr. Schumacher used this as a trial tactic intended to catch the district attorney by surprise, as he felt that the district attorney was waiting to call the co-defendant in rebuttal. The district attorney was allowed to reopen his case and bring the co-defendant in to testify, but Mr. Schumacher felt that the co-defendant had made a bad witness. He felt that the witnesses available to testify for the Petitioner would not have had much effect at that time. His main concentration was in attacking the co-defendant's statement during his closing argument.

Mr. Schumacher indicated that his only concern was the amount of time he had to prepare for the case. In testifying at the state habeas corpus hearing, however, he indicated that he did not know any more that he could have done other than to perhaps perform better research in certain areas. He did testify that he was able to research those areas and could not give any specifics that he was unable to do in that length of time. It is clear from all of the above that Mr. Schumacher did conduct a thorough investigation of the case and provided reasonably effective assistance of counsel. No testimony was presented to show any evidence that Mr. Schumacher could have obtained had he been allowed extra time. Effective counsel need only have the opportunity to investigate the charges against a defendant. The time spent in a case and with a defendant alone is insufficient to show that counsel is ineffective. See Wilkerson v. United States, 591 F.2d 1046 (5th Cir. 1979). In the instant case, nothing has been shown which would indicate that counsel could have done any more in representing Petitioner had more time been provided him.

The state habeas corpus court considered all of the evidence and determined that counsel did not file a change of venue motion but did question jurors thoroughly about pretrial publicity. Counsel investigated the circumstances in which Petitioner's hand had been cut, but did not want to emphasize the fact that blood samples from the crime scene matched the Petitioner's blood type. He did not think it wise to get into the details of the cut on the hand as Petitioner got the cut from being involved in a knife fight several days before the murder.

Prior to trial counsel filed a motion for individually sequestered voir dire, although made a tactical decision to withdraw this motion due to the feelings of the people in the area. Counsel made an opening statement at the first trial, filed motions, presented ten witnesses during the guilt and innocence phase, including the Petitioner, gave closing argument and asked the jury to consider the Petitioner's testimony during the sentencing phase and presented closing argument. At the second trial, counsel presented an opening statement, thoroughly cross-examined state's witnesses, made several motions and gave a closing argument.

Under all of these facts, the state habeas corpus court found that Petitioner's counsel was effective and did present a proper defense for the Petitioner. Respondent asserts that Petitioner has shown no independent basis to justify a finding of ineffective assistance of counsel and urges this Court to decline to consider this issue.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Freddie Davis.

Respectfully submitted,

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